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In the Supreme Court

of the

United States

October Term 1968

GLENS FALLS INSURANCE CO.,

Petitioner,

vs.

NATIONWIDE MUTUAL INSURANCE CO. and STATE FARM MUTUAL AUTOMOBILE INSURANCE CO.,

Respondents

Petition for Writ of Certiorari to the Supreme Court of the State of Montana

JOSEPH F. MEGLEN
2822 3rd Avenue North
Billings, Montana 59101
Attorney for Petitioner

Of Counsel:

ROBERT L. KELLEHER and
CHARLES A. BRADLEY
1343 Grand Avenue
Billngs, Montana 59102

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---

Petitioner prays that a Writ of Certiorari issue to review a judgment of the Supreme Court of the State of Montana which affirmed a judgment of the District Court of the Thirteenth Judicial District of the State of Montana in and for the County of Yellowstone, and which in the opinion of the petitioner is clearly in di-

rect conflict with a prior decision of the United States Court of Appeals for the Ninth Circuit and with *Clause 6, Sec. 10 of Article I, Sec. 1 of Amendment 14, and Clause 3, Sec. 8 of Article I* of the United States Constitution.

OPINIONS BELOW

The District Court delivered no written opinion or discussion of the case, but did make certain Findings of Fact and Conclusions of Law in connection with the entry of the decree in question. Copies of these Findings and Conclusions are attached in the *Appendix, pp. 1-7,* The opinion of the Montana Supreme Court is not yet reported.

JURISDICTION

Judgment of the Supreme Court of the State of Montana affirming the lower court decision was entered December 12, 1968, and a copy thereof is appended in the *Appendix at pp. 8-16.* The jurisdiction of this court is invoked under *28 U.S.C. 1257 (3).*

QUESTIONS PRESENTED

A statute of the State of Montana governing transfer of ownership of motor vehicles provides in part:

> "(d) Until said registrar shall have issued a certificate of registration and certificate of ownership and statement as hereinbefore provided, delivery of any motor vehicle shall be deemed not to have been made and title thereto shall not have passed and said intended transfer shall be incomplete and not be valid or effective *for any purpose.*"

(53-109(d), R.C.M., 1947) (emphasis supplied)

The petitioner's policy of insurance covering an automobile agency contained a provision excluding coverage for any vehicle when its *"possession has been transferred to another by the named insured pursuant to an agreement of sale."*

In refusing to acknowledge the validity of the foregoing exclusion in petitioner's policy in a case involving the sale of a motor vehicle where the title was not transferred on the records of the motor vehicle registrar, the Montana Supreme Court held that *Sec. 53-109(d)* means precisely what it says, i.e., that:

> "said intended transfer shall be incomplete and not be valid or effective *for any purpose."*

The questions presented are is *Sec. 53-109(d)* of the Revised Codes of Montana contra to:

1. Ruling of Ninth Circuit in *Colbrese v. National Farmers Union Property and Casualty Co., 368 F2d 405; Cert. den. 386 U.S. 991, (1967).*

2. *Sec. 10, Article I* of the United States Constitution which provides that "No state shall . . . . pass any . . . . law impairing the obligation of contracts, ..."

3. *Sec. 1 of the Fourteenth Amendment* which provides that no state shall "deprive any person of life, liberty or property without due process of law."

4. *Clause 3, Sec. 8 of Article I* granting the Congress "power to regulate commerce . . . . among the several states."

STATUTE INVOLVED

The Montana statute involved is *Sec. 53-109 R.C.M., 1947.* It s provisions are quoted and its history set forth by the Montana Supreme Court in a case somewhat similar to this one, *Safeco Insurance Co. v. Northwestern Mutual Ins. Co., (1963) 142 Mont. 158 through 163; 382 P2d at 176 through 178.*

Subparagraph (d) of *Sec. 53-109* quoted above under the sub-head "Questions Presented."

STATEMENT

The material facts in this case are not in dispute. On July 15, 1964, one William Parker signed a contract to purchase a 1956 Mercury sedan from Midland Dodge, Inc., of Billings, Montana, for $296.00. Parker paid *Midland* $100.00 cash and traded in a 1954 Chevrolet valued at $120.00 and was to pay the balance in two monthly installments. *Midland* surrendered possession of the vehicle to Parker and his minor son, in whose name the vehicle was ultimately to be titled and young Parker took possession of the Mercury, but *Midland* kept possession of the title.

On July 26, 1964, young Parker was involved in a two-car accident with the automobile resulting in its destruction. After the accident, he paid the balance owing to *Midland* and received from *Midland* the title to the Mercury, but never forwarded the title to the Montana registrar of motor vehicles.

After being sued because of the accident by the driver and passenger in the other auto, young Parker filed a third-party complaint against Nationwide Mutual Insurance Co., Glens Falls Insurance Co. and State Farm Mutual Automobile Insurance Co.

At the time of the accident, *Nationwide* had a liability insurance policy insuring a vehicle owned by William Parker other than the Mercury or the Chevrolet traded in. *Glens Falls* insured *Midland*. *State Farm* carried uninsured motorist's coverage on the parents of one of the plaintiffs in the original action.

At the time of the accident young Parker lived with his father, William.

The matter was submitted to the District Court on a Motion for Summary Judgment after the filing with the court of the depositions of William Parker and his son, the policies issued by the three insurance companies and copies of the certificate of title and contract for agreement of sale between *Midland* and William Parker. The court ruled in favor of *Nationwide* and *State Farm* and against *Glens Falls*. Because the original actions had been set for trial, *Glens Falls* settled them. The district court decision was affirmed by the Montana Supreme Court.

* * *

It is the contention of *Glens Falls* that either *Na-*

tionwide or *State Farm* is liable over to *Glens Falls* for sums paid to the plaintiff and to the attorney of the defendant.

The insurance policy of *Glens Falls* contained the following definition of an insured:

> "B. Definition of Insured: Persons Insured: Each of the following is an insured with respect to the Garage Operations Hazard except as provided below: . . . .
>
> (3) with respect to the Automobile Hazard: . . . .
>
> *None of the following is an insured: . . . .*
> *(iii) Any person or organization other than the named insured with respect to any automobile* (a) owned by such person or organization or by a member (other than the named insured) of the same household or (b) *possession of which has been transferred to another by the named insured pursuant to an agreement of sale."* (emphasis supplied)

During oral argument before the Montana Supreme Court, attorney for petitioner pointed out that if effect was not given to the foregoing exclusion, *Sec. 53-109(d) Revised Codes of Montana,* impaired the right of *Glens Falls* and *Midland* to contract. The policy exclusion was not mentioned in the opinion of the Montana Supreme Court. However, the U. S. Supreme Court has authority to review a state court decision notwithstanding that the appellate state court did not refer to the constitutional questions in its opinion. *International Harvester Co. vs. Missouri (Mo. 1914), 34 S.Ct. 859, 234 U.S. 199, 58 L.E. 1276.*

The U. S. Supreme Court has the right to look into

the opinion of the state court for the purpose of discovering the ground on which the judgment of the court actually proceeded, but it is not binding on the Supreme Court, and where the opinion is in favor of the party who claims a right or immunity under the Federal Constitution, and the judgment as rendered actually denies such right or immunity, a federal question is involved which gives the Supreme Court jurisdiction. *Bank of Commerce vs. Tennessee (Tenn. 1896), 16 S.Ct. 1113, 163 U.S. 416, 41 L.Ed. 211.*

Moreover, it would appear that petitioner need not have set up below in *"haec verba"* the exact constitutional grounds on which it was relying if the position of the petitioner was made clear to the court below and the court below considered that position in its opinion.

> "While the right was not originally specially set up and claimed, * * * under the rule of this court requiring the opinions to be sent up with the record, it has frequently been held to be a sufficient compliance with the words 'specially set up and claimed,' that it was fully considered in the opinion of the court and ruled against the plaintiff in error." *San Jose Land, etc., Co. v. San Jose Ranch Co., (Cal. 1903), 23 S.Ct. 487, 189 U.S. 177, 47 L.Ed. 765.*

The failure of the Montana court specifically to base its decision on constitutional grounds does not deprive the U. S. Supreme Court of jurisdiction.

> "On petition for certiorari to review a decree of a state court as denying or not duly recognizing a federal right set up therein, it is the Supreme Court's

province to inquire, not only whether such right was denied in direct terms, but also whether it was denied in substance and effect by interposing a non-federal ground of decision without fair support." *Ancient Egyptian Arabic Order of Nobles of The Mystic Shrine v. Michaux, (Tex. 1929), 49 S.Ct. 485, 279 U.S. 737, 73 L.Ed. 931.*

(1) *Decision Contra to Ninth Circuit Decision*

Two important recent cases interpreting this section of Montana law and arriving at opposite concl-u sions are *Safeco Ins. Co. of America vs. Northwestern Mutual Ins. Co., 142 Mont. 155, 382 P.2d 174 (1963)* and *Colbrese vs. National Farmers Union Prop. & Casualty Co., 368 F.2d 405; Cert. den. 386 U.S. 991 (1967).*

In *Safeco,* Bear Paw Sales and Service of Havre, Montana, had for sale a used Studebaker for which it held the certificate of title. Northwestern Mutual Insurance Co. had issued to Bear Paw a blanket garage owner's liability policy covering vehicles owned by Bear Paw while used in its business or while being driven with its permission and consent. Harlan Dean was the owner of a Hillman on which title had been issued to him subject to a mortgage. The Hillman was covered by a liability insurance policy issued by *Safeco* which carried the usual provisions insuring Dean against liability arising out of use of the Hillman or any "owned" replacement. Dean drove the Hillman to Bear Paw's premises and made arrangements with the sales

manager to try out the Studebaker and show it to his wife. A price of $350.00 plus trade-in was discussed. Dean left the Hillman with Bear Paw and drove away in the Studebaker which he used in his work as a salesman on that day, The following day Dean told Bear Paw that he would take the Studebaker and he continued in possession of the car for the next two days. On the second day he was involved in a collision. *Northwestern* refused to accept any liability under the garage owner's liability policy and *Safeco* filed a complaint seeking a declaratory judgment in order to have judicially determined which company was primarily responsible for Dean's defense and any liability imposed upon him as a result of the collision. The case was submitted on depositions. The District Court found that there was a completed sale and that Dean was the "owner" of the vehicle as that word was used in the *Safeco* policy. The District Court also found that the Studebaker was a replacement vehicle under *Safeco's* policy. Each policy contained similar "other insurance" clauses to the effect that with respect to a "non-owned" automobile coverage was afforded only as to the existence of liability over any other valid and collectable insurance. The issue was thus narrowed to whether Dean was the "owner" of the Studebaker at the time of the accident.

In its decision reversing the lower court, the Montana Supreme Court noted that while Bear Paw had a

record of the Studebaker and that when, ordinarily, an automobile is sold, Bear Paw would make a book entry covering the name of the purchaser, what it was sold for, and the date of the sale, no book entries were made with respect to this vehicle. Dean did not sign any order or contract of any kind and Dean still had title to the Hillman in his possession while Bear Paw had title to the Studebaker. Bear Paw had no records on the Hillman. Following Dean's recovery from his injuries as a result of the collision, either he or his wife took the Hillman back from the sales lot of Bear Paw and the matter was thus concluded.

The plaintiff contended that a change of ownership cannot be effected orally or in any other manner than through transfer of the certificate of title as required by the statute. The defendant maintained that the statute is a recording statute governing the record title as distinguished from actual ownership. The Supreme Court agreed with the plaintiff.

> "There is nothing unrealistic, technical or artificial about this simple procedure for the transfer of ownership of a motor vehicle. While defendants contend that even when following the statutory procedure dire consequences could result because of what might occur during the ten-day period (when the registrar of motor vehicles is transferring the title to the new owner), it seems to us rather clear that when the seller has executed the transfer upon the certificate of ownership and delivered it and the motor vehicle the sale is complete and any delay on the part of the registrar in issuing the new

> certificate of ownership would have no effect. In any regular transaction the new certificate of ownership is required to be issued by the registrar and issued as a matter of course. The transfer then becomes complete and valid and *dates back to the time of the transfer between the parties.* If the transfer has not been made in compliance with the statute and the registrar by reason thereof does not issue a new certificate of ownership, clearly there was no transfer of ownership in its inception." *142 Mont. 164, 382 P.2d 176.* (emphasis supplied)

Although in *Safeco* the court did not consider the situation where the title was given to the purchaser but he neglected to send it to the registrar, the foregoing was cited with approval in the instant case.

The facts in the *Colbrese* case went far beyond those in *Safeco.* On about September 2, 1958, a Mrs. McCormick agreed to sell a 1949 Ford to Albert Kinney for a certain sum which had been paid by Kinney to Mrs. McCormick in full. From September 2, 1958, up to December 3, 1960, the time of the collision, Albert Kinney had been in possession of the vehicle, claimed to be its owner, and had even paid for Montana licenses for the vehicle for the years 1959 and 1960. On four or five occasions between September 2, 1958, and December 3, 1960, Kinney had requested the attorney for Mrs. McCormick to furnish him with a certificate of title, but this had never been done.

U. S. District Judge Jameson said in his decision reported at *227 F.Supp. 978* that he felt bound by *Safeco.*

"The question presented by the motion for summary judgment is whether the 1949 Ford automobile is a 'non-owned automobile' by reason of the fact that no certificate of ownership was ever issued to Kinney in compliance with the provisions of Sec. 53-109, R.C.M., 1947 . . . In *Safeco* the court discussed at some length the history behind *Sec. 53-109,* rejecting the contention that the present statute was intended as a recording statute only . . . Compliance with the specific provisions of *Sec. 53-109* was held to be a prerequisite to transfer of title . . . It is true, as defendant argues, that this case is factually distinguishable from *Safeco* . . . Here as in *Safeco,* the transfer has not been made by the parties in compliance with the statute. Under the holding of the Montana Supreme Court, 'there was no transfer of ownership in its inception' and there 'was never a completed sale' . . . It is possible, as counsel for defendant have suggested, that as applied to a different factual situation the Supreme Court of Montana would modify its interpretation of *Sec. 53-109(d),* I do not feel that I can do so."

Judge Jameson was overruled by the Ninth Circuit which said:

"To hold that Albert Kinney was not the owner of the Ford within the meaning of the policies in suit would do violence to the intention of the parties, to traditional legal concepts of ownership, and to our own sense of right and wrong. There is no Montana authority which, on its facts, compels us to apply the technical statutory requirements for transfer so as to torture the terms of a contract. Absent such compulsion, we will not require appellant to underwrite a risk which it did not sell and for which it was not paid. Upon remand, the action will be dismissed." *368 F.2d 410.*

(2) *Sec. 53-109(d), R.C.M. violates Sec. 10, Article I of the Constitution by impairing insur-*

> *ance contracts which exclude coverage where possesson of a motor vehicle has been transferred to another pursuant to an agreement of sale.*

A distinction between *Safeco* and *Colbrese* on the one hand and the instant case on the other is that in the former two cases a certificate of registration was never delivered to the purchaser whereas here a certificate of ownership was delivered to the purchaser. In its brief in the lower court, *State Farm* declared that the exclusion contained in *Giens Falls'* policy providing that one who has obtained possession of a vehicle pursuant to an agreement of sale is not an insured is ineffective because transfer of possession is the same as "delivery" and under *Safeco* there can be no delivery until the registrar issues a new certificate of ownership

Because the state supreme court ruled in favor of *State Farm,* it must have agreed with it that regardless of whether the realer turns the title over to the buyer, if the latter neglects to send it to the registrar, the policy exclusion is inoperative by reason of *Sec. 53-109(d).* Thus, in effect, *Sec. 53-109(d)* impaired the contracts entered into by petitioner and *Midland.*

> "In cases of this character the jurisdiction of this court does not depend upon the form in which the legislative action is expressed, but rather upon its practical effect and operation as construed and applied by the state court of last resort, and this irrespective of the process of reasoning by which the decision is reached, or the precise extent to which

reliance is placed upon the subsequent legislation." *McCullough vs. Virginia (Va. 1898), 19 S.Ct. 134, 172 U.S. 102, 116, 117, 43 L.Ed. 382, 387, 388.*

Sec. 53-109(d), Revised Codes of Montana, further violates *Sec. 10, Article I* of the Constitution in that it fails to give effect to the intent of the parties to a contract for sale of an automobile, regardless of whether the contract is completed and predicates completion of the sale upon the ministerial acts of a minor state official, a person not a party to the contract, and prohibits transfer of ownership until such state official transfers upon his records ownership of the motor vehicle to the purchaser.

Not only does the statute nullify contracts between insurance carriers and automobile dealers where the purchaser of an automobile takes possession of all documents concerning registration of the car and himself refuses or fails to forward the certificate of title for transfer to his own name to the registrar of motor vehicles. It also fails to give full faith and credit to the laws and acts of a sister state where a citizen of such state purchases an auto in Montana and obtains all documents necessary for the transfer of title, but fails to arrange through the Montana registrar for rtansfer of title to himself and returns with the vehicle from Montana to his own state and such state does not predicate ownership of a motor vehicle upon the acts of the registrar of Montana but on the conduct of the seller and buyer.

(3) *The statute violates the Due Process clause of the Fourteenth Amendment.*

By forcing a liability insurance carrier to insure the unknown purchaser of a vehicle from an insured dealer, the sale otherwise being completed as between the purchaser and the dealer, until the purchaser and the registrar of motor vehicles at their own time and convenience transfer title and thus ownership of the motor vehicle, the statute deprives the insurance carrier of property without due process of law. The statute forces insurance carriers who collect premiums only to insure automobile dealers, regardless of the number of subsequent purchasers thereafter and regardless of the terms of the insurance contract excluding coverage under such circumstances, to insure said purchasers. Liability is forced upon the insurance carrier regardless of the terms of the policy, unless and until the title is transferred on the books of the registrar no matter how often the vehicle changes hands.

(4) *Decision Places Undue Burden on Insurance Industry and Automotive Dealers Involved in Interstate Commerce.*

According to *Sec. 53-107, R.C.M.*, the person entitled to possession of a vehicle may demand the certificate of title from the seller, and if the seller refuses to surrender the certificate he is guilty of a misdemeanor. By deliberately refusing to forward the certificate of

title to the regsitrar, the purchaser of an auto from a dealer need never purchase any liability insurance of his own. He would always know that he was "in the good hands" of the garage liability carrier. Conceivably, this condition (as the car changes hands) could go on for years. This would constitute an intolerable burden on both the insurance and automobile industries.

* * *

Finally, because this is a dispute between three insurance carriers rather than a dispute between an insured and a carrier none of the three carriers involved should be favored by the interpretation of any of their respective policies.

> "In the absence of ambiguity in an insurance contract, ordinarily neither party thereto can be favored in its construction." *44 C.J.S., Insurance, Sec. 297(b).*

CONCLUSION

The net effect of *Sec. 53-109(d),* R.C.M., is to impair the contract between petitioner and *Midland* by forcing petitioner to insure persons that it never contracted to insure. Furthermore, the statute deprives petitioner of property without due process of law and constitutes an undue burden on interstate commerce.

Because *Sec. 53-109(d)* is unconstitutional, it is urged that *Glens Falls* is entitled to an adjudication that it owed no obligation to Parker either to defend him or pay any judgment that might have been obtained against

him as a result of the automobile collision of July 26, 1964.

IF SEC. 53-109(d) IS ALLOWED TO STAND, THE ONLY SOLUTION AVAILABLE TO THE INSURANCE INDUSTRY IN MONTANA IS TO CANCEL ALL COVERAGE FOR AUTOMOBILE DEALERS.

It is submitted that the petition for a Writ of Certiorari should be granted and the judgment of the Montana Supreme Court reversed.

Respectfully submitted,

JOSEPH F. MEGLEN
2822 3rd Avenue North
Billings, Montana 59101

Of Counsel:

ROBERT L. KELLEHER
CHARLES A. BRADLEY
1343 Grand Avenue
Billings, Montana 59102

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